No. 8888

Joseph D. Harris, William A. Harris, Alexander C. McHenry, Alan E. Hoover, Executor, Pitman A. Walker, Mary Cooperman, and Cornelius A. Cooperman,

Appellants,

v.

Joan DeCosmo, Donald R. Hill, Ann Clarke Crane, Hilary King, and Mabel Peterson,

Appellees.

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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BRIEF OF APPELLANTS

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INDEX

Page

Opinion Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statute Involved 2

Question Presented 3

Statement of the Case 3

A. The Challenged Statute 3

B. The Proceedings Below 6

C. The District Court's Opinion 8

Summary of Argument 13

Argument 17

I. Establishment Clause Issue 17

A. Governing Constitutional Principles 18

1. Requirement of Government Neutrality .. 19

2. The Constitutional Test 22

3. Benefits to Religion 24

4. The Purpose and Primary Effect Analysis 27

a. Primary Effect 29

b. . . . That Neither Advances Religion 31

c. . . . Nor Inhibits Religion 35

B. Applying the Governing Principles 39

1. Purpose of the Salary Supplement Act .. 39

2. Primary Effect—No Advancement of Religion 42

3. Primary Effect—No Inhibition of Religion 52

4. Other *Walz*-Related Issues 60

Page

C. Appellees' Contentions 67
1. The "No Aid" Concept 67
2. Aid to Church Treasuries 68
3. Permeation and the Handbook 71

D. Conclusion 75

II. The Appellees' Free Exercise Claim 75

CONCLUSION 77

Appendix—Public Regulation of Nonpublic Education in Rhode Island 1a

TABLE OF CASES AND AUTHORITIES CITED

CASES:

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963) *passim*
Arizona v. *California*, 283 U.S. 423 (1931) 28, 41
Board of Education v. *Allen*, 392 U.S. 236 (1968) ..*passim*
Bradfield v. *Roberts*, 175 U.S. 291 (1899) 21, 33
Cochran v. *Louisiana State Board of Education*, 281 U.S. 370 (1930) 71
Daniel v. *Family Security Life Ins. Co.*, 366 U.S. 220 (1949) 41
Engel v. *Vitale*, 370 U.S. 421 (1962) 19, 43, 76
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 19, 20, 23, 43
Everson v. *Board of Education*, 330 U.S. 1 (1947) ..*passim*
Flast v. *Cohen*, 392 U.S. 83 (1968) 76
Johnson v. *Sanders*, 39 U.S.L.W. 2225 (D. Conn. decided October 14, 1970) 30, 53
Lemon v. *Kurtzman*, 310 F. Supp. 35 (E.D. Pa. 1969), *prob. juris. noted*, 397 U.S. 1034 (1970) 4, 26
McCollum v. *Board of Education*, 333 U.S. 203 (1948) 19, 26, 33, 43
McCray v. *United States*, 195 U.S. 27 (1904) 41
McGowan v. *Maryland*, 366 U.S. 420 (1961) 23-24, 76
Northern Securities Co. v. *United States*, 193 U.S. 197 (1904) 65
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 20, 59

Page

Speiser v. *Randall*, 357 U.S. 513 (1958) 38
Stewart Machine Co. v. *Davis*, 301 U.S. 548 (1937) .. 66
Tilton v. *Finch*, 312 F. Supp. 1191 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970) 12, 31, 33, 67
Torcaso v. *Watkins*, 367 U.S. 488 (1961) 23, 76
United States v. *O'Brien*, 391 U.S. 367 (1968) 41
United States v. *Ohio Oil Co.*, 234 U.S. 548 (1914) .. 65
Walz v. *Tax Commission*, 397 U.S. 664 (1970) ....*passim*
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 60
Zorach v. *Clauson*, 243 U.S. 306 (1952) 19, 20, 26, 33

CONSTITUTIONAL PROVISIONS:

First Amendment 2
Fourteenth Amendment 2

STATUTES:

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 54
R.I. Const. art. XII, § 1 .....3, 39
R.I. Gen. Laws
§ 16-1-9 .....44, 55
§ 16-7-15 3
§ 16-7-29 5
§ 16-19-2 .....5, 58
§ 16-22-2 .....5, 58
chap. 16-51 .....*passim*

OTHER AUTHORITIES:

J. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260 (1968) ..34, 41
D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513 (1968) .. 26
W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor*, 37 Geo. Wash. L. Rev. 223 (1968) 26
W. Valente, *Aid to Church-Related Education—New Directions Without Dogma*, 55 Va. L. Rev. 579 (1960) 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,
Appellants,

v.

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,
Appellees.

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Rhode Island is reported at 316 F.Supp. 112 (1970). It is reprinted in full starting at page 28 of the Joint Appendix (J.A.).

JURISDICTION

The District Court entered judgment in this case on June 17, 1970. J.A. 50-51. The appellants filed Notice of Appeal with the District Court on June 26, 1970. J.A. 53-54. This Court noted probable jurisdiction on November 9, 1970. —— U.S. ——. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This appeal draws in question the constitutionality of a Rhode Island statute entitled "An Act Providing Salary Supplements to Nonpublic School Teachers," R.I. Gen. Laws chap. 16-51 (referred to hereinafter as

the Salary Supplement Act). The text of the challenged statute was placed in evidence by the appellees as Exhibit No. 7 and is reprinted at J.A. 182.

QUESTION PRESENTED

The sole question presented by this appeal is whether Rhode Island's Salary Supplement Act, which provides supplements from state funds to the salaries of nonpublic school teachers, violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, because teachers in religiously affiliated schools are eligible for and receive benefits from that statute.

STATEMENT OF THE CASE

A. THE CHALLENGED STATUTE

The Rhode Island Constitution imposes upon the General Assembly of that State

> "the duty . . . to promote public schools *and* to adopt all means which they [the General Assembly] deem necessary and proper to secure to the people the advantages and opportunities of education." R.I. Const. art. XII, § 1. (Emphasis added.)

Mindful of that constitutional mandate and of the State's long-standing policy "to provide a quality education for all Rhode Island youth,"[1] the General Assembly in 1969 enacted the Salary Supplement Act to appropriate State funds for the payment of a 15 per cent supplement to the salaries of eligible teachers in nonpublic elementary schools. The Act, however, was more than the fulfillment of a solemn obligation.

[1] See R.I. Gen. Laws § 16-7-15.

It was an urgent response to a deepening crisis in the quality of education in the State's nonpublic schools.

The dimensions of that crisis are apparent in the express legislative findings in the statute.[2] The Act notes that 45,000 children attend nonpublic elementary schools in Rhode Island and that those children "constitute about 25% of the total school population at these age levels." R.I. Gen. Laws § 16-51-1. Because of the significant number of children educated by nonpublic schools, the General Assembly recognized that the plight of nonpublic schools was a matter of genuine public concern. The General Assembly traced the roots of the educational crisis facing nonpublic schools to the increasing inability of those institutions to keep pace with accelerating costs. Nonpublic schools were finding it difficult to maintain salary scales that would attract and retain competent teachers, and "teachers are the prime factor in educational quality." R.I. Gen. Laws § 16-51-1.[3]

The Salary Supplement Act was the General Assembly's answer to the crisis. The express purpose of

[2] The District Court found that "[t]he evidence introduced at trial fully corroborates the legislature's finding of a financial crisis in nonpublic education . . . ." J.A. 32.

[3] The testimony at trial showed that the Roman Catholic elementary schools in Rhode Island had been experiencing particular difficulties in obtaining qualified teachers because of their financial problems. J.A. 65, 88-89. The problems of those schools have been accentuated by the loss of nuns and the need to replace the nuns by lay teachers, who require considerably higher salaries. *Id.* The financial problems of Rhode Island's religiously affiliated nonpublic schools are only a microcosm of a nationwide crisis. The scope of that crisis is set out in some detail in the Brief for The National Catholic Educational Association, *et al.*, *Amicus Curiae*, pp. 14-17, *Lemon* v. *Kurtzman*, No. 89, October Term, 1970.

the Act is to permit nonpublic schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." R.I. Gen. Laws § 16-51-1. That solution was in no sense novel. For the General Assembly previously had provided a similar form of State assistance to public schools, which are supported primarily out of local tax funds. See J.A. 37, n. 7.

Only teachers in "nonpublic schools," as that term is defined by the Act, are eligible for salary supplement payments. The statute defines a "nonpublic school" as one which is not operated for profit, which is capable of permitting its students to fulfill the requirements of Rhode Island's compulsory school attendance law,[4] and which has an annual per pupil expenditure for secular education that does not equal or exceed the average per pupil expenditure in the State's public schools. R.I. Gen. Laws § 16-51-2.

A teacher in a nonpublic school satisfying that definition will be eligible for the salary supplement if he or she meets the additional qualifications imposed by section 3 of the statute. Briefly stated, those additional requirements are that a teacher teach only those subjects which are required to be taught by State law or which are actually taught in public schools, that the teacher be certified by the State Department of Education, that the teacher's salary meet the minimum salary requirements of State law for public school teachers,[5] that the teacher use only teaching materials in use in the public schools, and that the teacher not

[4] R.I. Gen. Laws § 16-19-2; see also R.I. Gen. Laws § 16-22-2.

[5] See R.I. Gen Laws § 16-7-29.

teach a course in religion while receiving a salary supplement from the State. R.I. Gen. Laws § 16-51-3.

The statute also limits participation in its benefits to those teachers whose total salaries, including the 15 per cent supplement, do not exceed the average maximum salary paid to public school teachers in the State. R.I. Gen. Laws § 16-51-4. Participating teachers must apply directly to the Commissioner of Education for the supplement, R.I. Gen. Laws § 16-51-3; the supplement must be paid directly to the teacher and "not through the agency of the nonpublic school in which the teacher is employed." R.I. Gen. Laws § 16-51-5. The State Department of Education is authorized to audit the books of nonpublic schools for the limited purpose of assuring that participating teachers are being paid at least the prescribed minimum salary. R.I. Gen. Laws § 16-51-5. For the first year of its operation, the General Assembly appropriated $375,000 to implement the salary supplement program.

B. THE PROCEEDINGS BELOW

The appellees, six individuals asserting the status of state taxpayers, filed a complaint with the United States District Court for the District of Rhode Island on December 16, 1969, challenging the constitutionality of the Salary Supplement Act under the Establishment and Free Exercise Clauses of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The essential constitutional defect alleged by the appellees was that the challenged statute "provides for direct financial aid out of state funds which support sectarian schools." Complaint ¶ 20, J.A. 8, 20. The named defendants were the State officials responsible for implementing

the statute. On February 11, 1970, the District Court granted a motion to intervene on behalf of the defendants filed by the appellants—seven teachers in Roman Catholic elementary schools, who had qualified for salary supplement payments, and two parents who had children attending Roman Catholic elementary schools.

A three-judge court was convened, as requested by the appellees in their complaint, and that court received evidence and heard arguments at a two-day trial. The evidence consisted of several documents and depositions and the testimony of nine witnesses.[6] The bulk of the evidence presented by the parties reflected their divergent views of the applicable legal principles. The appellees argued that the Establishment Clause bars all public financial assistance to religious or "sectarian" institutions, and their evidence emphasized the so-called "religious atmosphere" existing in parochial schools that benefit from the Salary Supplement Act. The appellants contended that government can constitutionally subsidize the secular educational functions performed by church-related schools and stressed in their evidence that teachers receiving salary supplement payments were engaged in solely secular educational activities.[7]

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[6] The witnesses who testified at trial were Edward F. Wilcox, who supervises the administration of the Salary Supplement Act; Rev. Edward W. K. Mullen, Superintendent of Schools for the Roman Catholic Diocese of Providence; and the seven teachers who are appellants in this case. Appellees also placed in evidence the depositions of two other parochial school teachers who had qualified for salary supplement payments.

[7] Consistent with their view of the controlling constitutional principles, the appellants objected to all evidence offered by the appellees to show a so-called "religious atmosphere" in parochial schools.

On June 15, 1970, after receiving post-trial briefs, the District Court filed its opinion holding that the Salary Supplement Act contravened the Establishment Clause of the First Amendment. Judge Pettine entered a separate opinion, concurring in part and dissenting in part. The District Court entered its judgment two days later and, after denying applications for a stay of its injunction pending direct appeal to this Court, the court below permanently enjoined the statute's operation. On June 26, 1970, the appellants presented an application to Mr. Justice Brennan, Circuit Justice for the First Circuit, for a stay of the permanent injunction until this Court could consider and decide the appeal. Mr. Justice Brennan referred the application to the entire Court and, on June 27, 1970, the Court granted the stay, with Mr. Justice Douglas dissenting and Mr. Justice White and Mr. Justice Marshall taking no part in the consideration of the application. 399 U.S. 918 (1970).

C. THE DISTRICT COURT'S OPINION

The District Court did not enter separate findings of fact and conclusions of law. Consequently, its opinion is the sole source of the facts it deemed relevant to the legal issues in the litigation. And those facts reflect the two divergent lines of evidence presented by the parties.

The District Court found that the evidence presented at trial concerning Roman Catholic elementary schools [8]

[8] There are two explanations for the emphasis at trial and in the District Court's opinion on those nonpublic schools that are affiliated with the Roman Catholic Church. First, 95 per cent of all Rhode Island children enrolled in nonpublic schools attend Roman Catholic parochial schools. J.A. 32. Secondly, to date, only teachers in Roman Catholic parochial schools have applied for benefits under the Salary Supplement Act. *Id.*

fully corroborated the General Assembly's findings that nonpublic schools in the State were having great difficulty maintaining their educational quality because of the rapidly accelerating cost of teachers' salaries. J.A. 32. However, despite the legislature's concern for the financial plight of nonpublic schools, the District Court also found that the challenged statute would not relieve Roman Catholic parishes which support parochial schools of their escalating financial burdens. Those parishes will continue to spend increasing amounts of their own funds in their quest for educational quality, and the Salary Supplement Act will simply permit parochial schools to obtain better qualified teachers. J.A. 32.

The District Court noted that parochial schools "possess a number of distinctively religious attributes which distinguish them from public schools." J.A. 35. Among those "religious attributes" are the proximity of parochial schools to the parish church, religious symbolism on and within the school building, the teaching of a course in religion and certain other religiously oriented activities.[9] The District Court also found a concern for religious values in a Diocesan Handbook of School Regulations, which appellees placed in evidence over strenuous objections.[10] The Handbook purports to be a set of guidelines for parochial school principals, although the District Court noted that not all of its provisions have full force and effect. J.A. 34. On the basis of those facts, the District Court concluded that the Roman Catholic Church "gains special ad-

[9] The "religious attributes" listed by the District Court in its opinion, J.A. 35-36, were, in effect, a summary of the evidence offered by the appellees to show that a "religious atmosphere" existed in Roman Catholic parochial schools.

[10] Plaintiffs' Exhibit No. 14, J.A. 191.

vantage from a curriculum which contains both religious and secular subjects," and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." J.A. 36."

The District Court also found, however, that the religious attributes of parochial schools and their concern for religious values "[do] not necessarily affect the content of secular subjects in diocesan schools." J.A. 35. The District Court noted that all teachers who testified at trial stated that they did not inject religion into their secular courses and that "[t]his testimony gains added credibility from the fact that several of the teachers were non-Catholics." J.A. 35. The District Court also pointed out that teachers qualifying for salary supplements were required to use only those teaching materials approved for use in the public schools.

The District Court's review of the evidence concluded with the following statement:

> "These determinations point to two ultimate facts. On the one hand, we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise." J.A. 37.

[11] Strictly speaking, the conclusions quoted above from the District Court's opinion cannot be considered findings of fact, since the record of this case contains no competent evidence to show why the Roman Catholic Church supports and maintains elementary schools or what role those schools play in the religious mission of the Roman Catholic Church. However, this Court has already indicated that those considerations are irrelevant to the question of whether the state can constitutionally spend its funds to aid the secular educational process in religiously affiliated schools. See *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970).

The District Court began its Establishment Clause analysis by purporting to apply the "purpose and primary effect" test first articulated by this Court in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963), and subsequently applied to the issue of public financial assistance to church-related education in *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968).[12] The District Court had little trouble holding that, in light of the Salary Supplement Act's express statement of purpose, R.I. Gen. Laws § 16-51-1, the challenged statute had the secular purpose demanded by the *Allen* test. However, the *Allen* requirement of a primary secular effect caused the District Court greater problems.

Having found that the Salary Supplement Act had generated two significant effects—one clearly secular and the other characterized as religious—the District Court declined to engage in further analysis to determine which effect should be considered "primary"

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[12] The District Court quickly and correctly disposed of two legal arguments made by the appellees. First, the District Court ruled that the appellees' separate claim based on the Free Exercise Clause of the First Amendment failed for lack of proof. J.A. 37-38. Secondly, the District Court rejected the appellees' Establishment Clause argument based on the following language from *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Appellees contended that language imposed an absolute prohibition on all public aid to religious institutions. The District Court properly noted that any such reading of *Everson* was belied by its holding. See also *Walz* v. *Tax Commission*, 397 U.S. 664, 670-71 (1970).

within the meaning of the *Allen* test.[13] Rather, the District Court read this Court's more recent decision in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), as refining the *Allen* test of primary effect and directing the inquiry solely to whether the challenged spending program results in "excessive entanglements" between government and religious institutions. The District Court concluded that the Salary Supplement Act had produced such impermissible entanglements and therefore had an effect proscribed by the Establishment Clause. The District Court also expressed concern that efforts by religiously affiliated schools to qualify their teachers for salary supplement payments could limit the internal freedom of those schools to order their curricula.

In a separate opinion, Judge Pettine concurred with the majority's conclusion that the Salary Supplement Act would lead to excessive entanglement between government and religion. But he dissented from the majority's ruling that the statute had the effect of providing substantial support to a religious enterprise. Relying specifically on this Court's recognition in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction, 392

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[13] In so ruling, the District Court specifically rejected the appellants' argument that the *Allen* decision requires that the primary effect be measured by reference to the educational function beign subsidized by the public funds. Under that analysis, a challenged statute will have the necessary primary secular effect if funds appropriated under the statute support only secular educational functions of religiously affiliated schools. A three-judge district court in Connecticut applied that precise test in sustaining th econstitutionality of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58, in the face of an Establishment Clause challenge. *Tilton* v. *Finch*, 312 F.Supp. 1191 (D.Conn.), *prob. juris. noted*, 399 U.S. 904 (1970).

U.S. at 245-48, Judge Pettine asserted that state support for the secular educational functions of parochial schools could not be considered support for a religious enterprise unless there was proof that the secular teaching in those schools is permeated by religion. Judge Pettine found the record in this case barren of any such proof of permeation.[14]

SUMMARY OF ARGUMENT

The District Court's ruling that the Salary Supplement Act contravenes the Establishment Clause is clearly at war with the governing constitutional principles laid down by this Court's decisions. The fundamental error made by the District Court was to apply the recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), in a manner that would invalidate any significant governmental program to improve the quality of secular education in nonpublic schools with religious affiliations. In so ruling, the District Court necessarily disregarded this Court's repeated affirmation that the central concern of the Establishment Clause is that government be neutral in matters touching upon religion.

This Court's decisions have discussed the Establishment Clause in terms of separation of church and state but have recognized that absolute separation is neither practical nor required. The problem is inevitably one of degree, and the degree of separation demanded is defined by the requirement of govern-

[14] Even the majority found no proof of permeation. At most, the majority found a religious atmosphere existing in Rhode Island parochial schools. But it also was careful to point out that the so-called religious atmosphere did not affect the teaching of secular subjects in those schools. J.A. 35, 36.

ment neutrality. The principle of neutrality at once acknowledges the inevitability of contacts and interaction between government and religion in modern society and serves to reconcile the overlapping, and occasionally competing, dictates of the Establishment and Free Exercise Clauses of the First Amendment.

The requirement that government be neutral in its dealings with religion or religious institutions is fully implemented by the purpose and primary effect test enunciated in *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963), and subsequently applied in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), to the precise question of public financial assistance to church-related education. Under that test, a statute will survive Establishment Clause scrutiny if it has a secular purpose and a primary effect that neither advances nor inhibits religion. A statute having such a purpose and primary effect will not fall simply because religiously affiliated institutions derive tangible benefits from it.

The decisions in *Allen* and *Walz* provide precise guidance for applying the purpose and primary effect test to public spending programs for education which benefit religiously affiliated schools. A statute's purpose is to be adjudged according to any statement of legislative purpose it contains, and a statute's effects are to be evaluated according to their relationship to the stated purpose. The principal focus of the primary effect inquiry is the nature of the educational functions supported by public funds—not the religious or non-religious nature of schools benefiting from those funds. If the government supports only the secular educational functions of religiously affiliated schools, the statute will not have a primary effect of *ad-*

vancing religion. And if the statute's administrative scheme does not produce excessive or impermissible involvement with religion, the spending program will not have a primary effect of *inhibiting* religion.

Those governing constitutional principles lead inescapably to the conclusion that the Salary Supplement Act is in harmony with the Establishment Clause. The stated purpose—to improve the quality of secular education in Rhode Island's nonpublic schools—is demonstrably secular. Payments made under the Act go only to those teachers in religiously affiliated schools engaged in solely secular teaching activities. The principal administrative relationships created by the Act are between State officials and individual teachers, and the involvement between government and religious institutions is, at most, minimal. And those administrative relationships are carefully tailored to assure a proper and constitutional use of public funds and to avoid any government involvement in the religious functions of church-related nonpublic schools. Consequently, the Salary Supplement Act has a secular purpose and a primary effect that neither advances nor inhibits religion.

The District Court's contrary conclusion resulted from its failure to adhere to the governing Establishment Clause principles. First, the District Court labeled two of the statute's effects as "significant" and declined to engage in the required further analysis to determine which of those effects was "primary" for Establishment Clause purposes. Second, the District Court viewed the minimal involvements between the State and religiously affiliated schools under the Act as constitutionally disabling while ignoring the already substantial and legally necessary involvement

existing between the State and those schools apart from this statute.

The appellees' principal Establishment Clause argument in the court below was premised on a single sentence in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). But, as the *Walz* decision illustrates, the *Everson* language relied on by the appellees was not intended by this Court as a definitive and final test of Establishment Clause limitations on government power. The appellees also contended that the challenged statute provides direct financial assistance to churches. But, as the evidence in this case demonstrates, that argument is premised not on the consequences of the statute's operation but on the consequences that would flow if appellees are successful in enjoining the operation of the Act in this litigation. Finally, the appellees relied on a single and suspect piece of evidence to argue that secular teaching in parochial schools is permeated by religion. Far more credible evidence, however, convincingly refutes that contention.

The appellees also alleged that the Salary Supplement Act violated the Free Exercise Clause because it amounted to "compulsory taxation for the support of religion or religious institutions." The District Court, however, properly ruled that the appellees had failed to present the proof necessary to support such a constitutional claim.

ARGUMENT

I.

ESTABLISHMENT CLAUSE ISSUE

The fundamental error made by the court below was to apply the decision in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), in a manner that imposes a virtual constitutional bar to all public financial assistance to the secular aspects of church-related education. The District Court did not expressly state that rule in its *Walz* analysis. But its view of the "excessive entanglement" doctrine, if sustained by this Court, would necessarily produce that result. For the District Court construed any entanglement or involvement between government and religiously affiliated schools arising from a public assistance program as per se prohibited by the Establishment Clause. In so ruling, the court below disregarded this Court's admonition that the test of entanglement "is inescapably one of degree." 397 U.S. at 674. *Walz* speaks of permissible contacts and impermissible involvements. But the court below viewed every contact as an involvement and two or three contacts as excessive entanglement.

The strong approval voiced in *Walz* of the decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Everson* v. *Board of Education*, 330 U.S. 1 (1947), demonstrates that the *Walz* doctrine does not forbid all contacts between government and religiously affiliated schools that arise in educational assistance programs. The entanglement concept seeks to safeguard the primary constitutional value of religious neutrality. Any application of the doctrine that violates that value stands self-condemned. The practical result of the District Court's decision is to preclude Rhode Island

from adopting any significant program of assistance to the secular education of children attending religiously affiliated schools. Such a result is hostile —not neutral—toward the right of parents to choose such schools, the right of teachers to teach in them, and the right of the state to provide, by mandate and assistance, for the secular education of all its children.

The errors of the District Court's decision become more manifest when set against the principles which have emerged from this Court's other Establishment Clause decisions. This brief will summarize those principles and demonstrate that they compel the conclusion that the Salary Supplement Act passes constitutional muster. This brief will also expose the improper application of those principles to the facts of this case by the District Court and answer some of the appellees' arguments which are at war both with the governing constitutional standards and a proper application of those standards.

A. GOVERNING CONSTITUTIONAL PRINCIPLES

In its most recent examination of the limitations imposed by the religion clauses of the First Amendment on governmental power, this Court observed:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

The terse language of the Establishment Clause provides scant guidance for its application to specific governmental actions. However, in several leading de-

cisions over the past 23 years, this Court has sketched in the contours of the Establishment Clause's restrictions on governmental power. To give form and substance to the Establishment Clause, those decisions have looked to the historical context in which the First Amendment was adopted and the modern societal values protected by the no-establishment guarantee.

The controlling constitutional standard has not emerged full-blown from any single decision of this Court. Rather, the test has evolved gradually as the Court has been required to apply the Establishment Clause prohibition to differing factual situations. Significantly, most of the leading decisions on this constitutional issue have involved the related problems of religion in the public schools[15] and public financial assistance to church-related education.[16] It is to that course of decisions that the Court must now look to resolve the constitutional questions raised by this appeal.

1. Requirement of Government Neutrality

This Court has consistently recognized that, in Establishment Clause cases, the "constitutional standard is the separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment Clause "does not say that in every and all respects

[15] *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); see also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

[16] *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

there shall be a separation of Church and State." *Zorach* v. *Clauson*, *supra*, at 312; see *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson*, *supra*, at 314; *Board of Education* v. *Allen*, *supra*, at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people."

The principle of neutrality recognizes that there will inevitably be interaction between government and religious institutions in modern society, as this Court recently acknowledged in *Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). For example, almost 50 years ago this Court ruled that a state could not constitutionally deny private schools, including those with religious affiliations, the right to exist. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). At the same time, however, the Court conceded the states' power to regulate such religiously affiliated schools closely to assure that they provide an education meeting minimum state standards of quality. 268 U.S. at 534; see also *Board of Education* v. *Allen*, 392 U.S. 236, 245-47 (1968). Such schools must also comply with government health and safety regulations, and the government makes available to those schools services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. See *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947); *Walz* v. *Tax*

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[17] See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 669-70 (1970); *Board of Education* v. *Allen*, 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

Commission, 397 U.S. 664, 667 (1970). And, in some instances, government has chosen to work through established private social welfare agencies, including those with religious affiliations, to achieve its public welfare goals. See, *e.g.*, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

In light of these substantial and inevitable contacts between government and religious institutions in today's society, the principle of neutrality assures a course of governmental conduct that neither advances nor inhibits religion while permitting religiously oriented activities to co-exist in the secular world with state-sponsored welfare activities. The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. This Court recently observed:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission*, 397 U.S. 664, 668-69 (1970).[18]

Only the principle of neutrality can minimize the potential conflicts between the two religion clauses and promote the goal of religious liberty which both clauses seek to implement.

The neutrality demanded of government by the Establishment Clause has been expressed in somewhat different language by the Court, but the limitations imposed on government power by the command of

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[18] See also *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963); *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970). Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen*, 392 U.S. 236, 242-43 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963).

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970).

2. The Constitutional Test

From this Court's several Establishment Clause decisions, there has emerged a precise test for evaluating the constitutional validity of the interaction between government and religion in the realm of education. It is a test which fully implements the principle of neutrality and which places well-defined limitations on governmental power. It prohibits government from supporting religious formation in the schools of the Nation, public or nonpublic. But it places no limitations on the power of government to support and sponsor secular education in every secularly qualified school, public or nonpublic. The test was first fully articulated in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963), as follows:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Consti-

> tution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

That precise test, however, had been applied by this Court two years earlier in *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961), and *Torcaso* v. *Watkins*, 367 U.S. 488, 489-90 (1961),[19] and that test has been controlling in all of the Establishment Clause cases decided by this Court subsequent to *Schempp*. See *Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968);[20] *Epperson* v. *Arkansas*, 393 U.S. 97, 106-09 (1968); *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

Of the several cases that have applied the "purpose and primary effect" test, the decision in *Allen* is most directly relevant to the issues in this appeal. The *Allen* case, like this appeal, involved the Establishment Clause validity of a public aid program that benefited religiously affiliated schools. At issue in *Allen* was a New York statute that required local school boards to loan secular textbooks without charge to pupils in grades seven through twelve in both public and private schools, including those with religious affiliations. The express ruling of this Court was that

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[19] Although the "purpose and primary effect" test was not employed in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), this Court has subsequently commented that "[t]he statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.'" *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); see also *McGowan* v. *Maryland*, 366 U.S. 420, 442-44 (1961).

[20] The *Allen* decision not only applied the purpose and primary effect test but also quoted the *Schempp* formulation of that test verbatim. 392 U.S. at 243.

the textbook loan program, in both its purpose and primary effect, neither advanced nor inhibited religion. 392 U.S. at 243-44. That *Allen*, in both its rationale and result, was consistent with Establishment Clause doctrine was confirmed by the majority in *Walz*, which said of the *Allen* decision: "In so holding the Court was heeding both its own prior decisions and our religious tradition." 397 U.S. at 672.

Consequently, as the court below recognized,[21] the purpose and primary effect test, as enunciated in both *Schempp* and *Allen*, is the constitutional standard that governs the Establishment Clause issue in this litigation. It is a test which assures that government will maintain its required posture of neutrality in its educational programs. It is a test which has emerged gradually but definitively as this Court has been required to apply the no-establishment guarantee to differing factual situations. And it is the test that this Court has applied to the precise question of whether the Establishment Clause prohibits the government from including religiously affiliated schools in spending programs designed to improve secular educational quality.

3. Benefits to Religion

A challenged statute will not run afoul of the Establishment Clause merely because religion or religiously affiliated institutions happen to derive benefit or suffer detriment from it. That principle is a necessary corollary of the purpose and primary effect test, and found perhaps its fullest expression in the Sunday Closing Law cases.[22] Any test predicated upon the

[21] See J.A. 39.

[22] See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 442-45 (1961).

existence of a *primary* effect necessarily presupposes that the governmental program in question has generated a number of effects. What the primary effect requirement demands is that a serious, substantial public benefit result from the legislation, a benefit that, in itself, neither advances nor inhibits religion. The statute must be religiously neutral, not in the sense that it has no religious effects, but in the sense that those effects are collateral or incidental to the statutory scheme and not inherent in it. Once that requirement is satisfied, the challenged program will be consistent with the Establishment Clause's requirement of religious neutrality, even though the statute has the incidental effect of conferring certain tangible benefits or imposing detriments on religion or religiously affiliated institutions.

Thus, in *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947), the Court upheld New Jersey's bus transportation program even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, in *Board of Education* v. *Allen*, 392 U.S. 236, 244 (1968), the Court acknowledged that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school." [23] Surely a religiously affiliated school benefits and becomes a more viable institution when more children attend it as the result of a public spending program. See *Walz* v.

[23] In fact, when the Court cited the result in *Allen* with approval in *Walz* v. *Tax Commission*, 397 U.S. 664, 671-72 (1970), it did so despite its statement that the textbook loan law relieved churches sponsoring schools "of an enormous aggregate cost for those books."

Tax Commission, 397 U.S. 664, 670-72 (1970). But, as the Court observed in *Allen,* such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244. Such an effect will not make the spending program constitutionally infirm as long as the program generates the required primary secular and religiously neutral effect.

When, as here, a governmental spending program for the improvement of education, health or the general welfare is attacked on Establishment Clause grounds, the incidental benefit corollary to the purpose and primary effect test simply recognizes the realities of our social order and implements the principle of neutrality. Such governmental programs typically seek to draw upon the experience and resources of all public and private agencies to achieve the program's goals. Because of the prominent role traditionally played by church-related organizations in public welfare work,[24] the exclusion of such organizations from programs designed to improve and expand welfare services would tend to frustrate the achievement of important and legitimate secular goals.[25] Such an exclusion could also properly be viewed as government hostility to religion.[26]

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[24] See D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 513-516 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor,* 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

[25] See *Lemon* v. *Kurtzman,* 310 F.Supp. 35, 47 (E.D.Pa. 1969), *prob. juris. noted,* 397 U.S. 1034 (1970).

[26] Government hostility toward religion is plainly forbidden by the Establishment Clause. See *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1952); *McCollum* v. *Board of Education,* 333 U.S. 203, 211-12 (1948).

To be sure, religiously affiliated organizations benefit from their participation in public welfare spending programs if, as a result, they are better able to provide various welfare services, such as a better education in the sciences. But, under the incidental benefit corollary, that fact is not decisive in resolving an Establishment Clause challenge to such programs. The central inquiry, and the focus mandated by the purpose and primary effect test, is whether a primary effect of the expenditures is the achievement of the program's legitimate secular goals.

4. The Purpose and Primary Effect Analysis

The remaining problem is the basis for determining whether a challenged statute has a secular purpose and a primary effect that neither advances nor inhibits religion. The Salary Supplement Act is alleged to be constitutionally defective because the General Assembly, in seeking to improve the quality of secular education in Rhode Island's nonpublic schools, extended the statute's benefits to teachers in religiously affiliated schools. This Court's decisions in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), provide precise guidance for applying the purpose and primary effect test to such a public aid program.

The secular purpose inquiry under the governing test presents little difficulty when the contested statute contains an express statement of legislative purpose that is clearly within the secular competence of the state. *Allen* makes that statement of purpose controlling. For example, the Court noted that New York's textbook loan law was based on legislative "findings that the 'public welfare and safety require

that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.'" 392 U.S. at 239. Then, after reciting the purpose and primary effect test as the controlling constitutional standard, the Court declared:

> "The express purpose of [the challenged statute] was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its *stated purpose.*" 392 U.S. at 243. (Emphasis added.)

The *Allen* decision did not fashion new law in focusing the inquiry on the statute's statement of purpose. For it has long been the rule that "the specific statement of primary purpose in the act governs." *Arizona* v. *California*, 283 U.S. 423, 456 (1931).

The primary neutral effect inquiry is more complex because a legislative enactment will invariably produce a multiplicity of effects, some of which are clearly secular and some of which may be characterized as religious. For example, the court below identified two "significant" effects flowing from the Salary Supplement Act: the improvement of the quality of secular education in Rhode Island's Roman Catholic parochial schools, and aid to religious enterprises. J.A. 37. But the District Court treated those two effects in a manner that is wholly inconsistent with the controlling principles enunciated by this Court in *Schempp, Allen* and *Walz*.

Two essential questions must be answered in the primary effect analysis. First, what is the basis for determining which of the statute's effects is "pri-

mary"? Second, when the primary effect has been identified, what is the basis for determining whether it is religiously neutral, neither advancing nor inhibiting religion? The original parameters of the primary effect inquiry were defined by the *Schempp* and *Allen* decisions. The *Walz* decision subsequently added an important dimension to the *Schempp-Allen* inquiry. The essential error of the District Court was in reading *Walz* as superseding, rather than reinforcing, the *Schempp-Allen* primary effect requirements.

The *Allen* and *Walz* decisions provide the principal guidance for adjudging the primary effect of a program of public assistance to improve the quality of secular education. *Allen* establishes the basis for determining whether the primary effect of such a program is to *advance* religion, and *Walz* sets forth the criteria for determining whether the primary effect is to *inhibit* religion. Under *Allen,* the primary effect advances religion only if the public funds subsidize religious instruction or instructional materials. Under *Walz,* the primary effect inhibits religion if the execution of the statutory program results in an "excessive entanglement" of the government in religious affairs.

a. Primary Effect

The major concern of the "primary effect" test, as *Schempp* and *Allen* make clear, is that government not use a religious means to achieve a clearly valid secular end. In *Schempp,* devotional exercises in the public schools were defended on the ground that they contributed to the formation of good citizens. The Court rejected that argument, ruling that the Establishment Clause prohibits the government from making religion an engine of civil policy. 374 U.S. at 223-27. In *Allen,*

however, the Court found it consistent with the Establishment Clause for the state to employ the secular instrument of secular textbooks to further the secular education of all school children, irrespective of where they attend school.

Neither the *Schempp* nor *Allen* decisions discussed the relative importance of the secular and religious effects involved in those cases. But no such discussion was necessary because it was clear in *Schempp* that the means were religious and in *Allen* that the means were secular. However, when, as in this case, a court identifies two important or significant effects—one secular and one religious—the *Allen* decision provides the standard for determining which of those two effects is to be considered "primary" for Establishment Clause purposes. In *Allen*, the Court stressed that there was "nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U.S. at 243. The Court was clearly concerned with whether the challenged statute had produced an effect which was consistent with and which implemented its stated purposes. If there is such an effect, it will be viewed as "primary" in the application of the purpose and primary effect test. Consequently, in the search for a statute's primary effect, the several effects generated by the enactment are to be evaluated according to their relationship to its purpose. The effect intended by the legislature is primary.

It may be true, as one District Court recently observed, that "[t]he 'primary effect' of legislation . . . is not always precisely that which its authors optimistically predict in their statements of purpose." *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D. Conn., decided October 14, 1970). But when a statute produces the

precise effect envisioned by the legislature and, more importantly, when that effect is the furtherance of the statute's secular goals, Establishment Clause limitations on legislative power have been fully satisfied.

That important principle comports with reason and logic. When the legislature acts to improve the quality of secular education, the judicial inquiry should be directed to whether the statute, in its operative effect, achieves that goal. Any such effect is necessarily the primary impact of the legislation. To focus on the fact that religiously affiliated schools happen to derive benefits from such legislation is to emphasize an effect that has consistently been considered only incidental to central Establishment Clause concerns. For, from *Everson* through *Walz*, this Court has repeatedly ruled that an otherwise valid enactment will not be struck down on Establishment Clause grounds simply because religion or religiously affiliated institutions benefit or suffer incidentally from the enactment.

b. . . . That Neither Advances Religion

A critical aspect of the inquiry whether the primary effect of a statute advances religion is whether that question is to be resolved by examining the secular or non-secular use made of the public funds or, instead, by examining the secular or non-secular character of institutions benefiting from those funds. The *Allen* decision makes it clear that it is the use made of the funds—and not the nature of the institutions—that controls. See also *Tilton* v. *Finch*, 312 F. Supp. 1191, 1198 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970).

The Court in *Allen* placed substantial reliance on its earlier decision in *Everson* in upholding the New York statute. The appellants in *Allen* argued quite force-

fully that *Everson* could not control because free bus rides are constitutionally distinguishable from free textbooks. The basis for the proffered distinction was that textbooks, unlike bus transportation, aid the educational process and that "[t]here is no such thing as secular education in a sectarian elementary or secondary school. The whole curriculum is permeated by religion." Brief for Appellants, p. 16, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The Court rejected that argument, finding it unsupported by the record in the case and at odds with its prior decisions.

The Court's review of those prior decisions began with the assertion that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," 392 U.S. at 245; see also *Everson* v. *Board of Education,* 330 U.S. 1, 3 (1947), and concluded with this statement:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247-48.

The New York act was sustained because it authorized only the lending of secular textbooks to students, whether they attended public or religiously affiliated

schools. 392 U.S. at 244-45. And the Court stressed that the textbook loan law did not result in "unconstitutional involvement of the state with religious instruction." 392 U.S. at 248.

Thus, the secular-religious dichotomy in the functions performed by religiously affiliated schools and the limitation of public assistance to the secular function was the precise focus of the primary effect analysis in *Allen*. The contested statute was sustained *because* it subsidized only the secular educational functions of religiously affiliated schools and did not aid the religious functions of those schools. That test of primary effect is wholly consistent with this Court's prior Establishment Clause decisions. In *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), the Court invalidated Illinois' "released time" program because tax-supported property was subsidizing religious instruction. *Cf. Zorach* v. *Clauson*, 343 U.S. 306, 308-09 (1952). But, in *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), the Court agreed that church-related schools could share in those public benefits which are "so separate and so indisputably marked off from the religious function" performed by those schools. *Cf. Bradfield* v. *Roberts*, 175 U.S. 291 (1899). Consequently, a public spending program that aids only the secular educational functions of religiously affiliated schools will not have the effect of advancing religion. That schools of a religious nature benefit from such enactments is not constitutionally controlling.[27]

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[27] That distinction was drawn most succinctly by the District Court in *Tilton* v. *Finch*, 312 F.Supp. 1191, 1198 (D.Conn.), *prob. juris. noted*, 399 U.S. 904 (1970), when it ruled that "[t]he focus of this test [of primary effect] as applied in *Allen* is the function secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid."

The fact that the government purports to aid only secular educational functions does not necessarily foreclose the primary effect inquiry. In *Allen,* the Court was confronted by a "meager record" containing nothing to refute the legislative and public judgment that religiously affiliated schools perform the dual functions of secular education and religious instruction. 392 U.S. at 248. The Court took pains to note that the record failed to support the allegations that all teaching in a religiously affiliated school is religious or that the secular and religious educational processes are necesarily intertwined. "No evidence has been offered about particular schools, particular courses, particular teachers, or particular books." *Id.*

The decision in *Allen,* therefore, clearly permits those challenging particular forms of aid to church-related education to show that, in fact, the public assistance is not confined to the secular educational functions of religiously affiliated schools. The challengers would presumably prevail if they could prove that the publicly assisted secular functions of religiously affiliated schools were so permeated by religion that no meaningful distinction could be drawn between the secular and religious functions of participating schools.[28] But, absent such proof of permeat on, gov-

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[28] See W. Valente, *Aid to Church-Related Education—New Directions Without Dogma,* 55 Va. L. Rev. 579, 588-89 (1960); *cf.* J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 291-303 (1968).

Proof of such a fusion of the secular and religious functions would stand on a far different legal footing from the unsubstantiated assertions of the appellants in *Allen* that permeation was a fact of the educational life of church-related schools. The appellants in *Allen* were, in effect, asking for a constitutional presumption of permeation. The Court rejected that presumption and firmly established the presumption of nonpermeation. But the Court did not foreclose the possibility of overcoming the presumption of nonpermeation by proof to the contrary.

ernment assistance to the secular educational functions of religiously affiliated schools is constitutionally permissible.

c. . . . Nor Inhibits Religion

The second part of the primary effect inquiry—whether a contested statute operates to inhibit religion—is governed principally by the *Walz* decision, which held that government did not violate the Establishment Clause by exempting church property from taxation. The Court in that case framed its "effect" inquiry in these terms: "We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion." 397 U.S. at 674. Although there was no issue in the *Walz* case of public financial assistance to church-related institutions, the Court, in the course of that decision, observed:

> "[A] direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." 397 U.S. at 675.

Thus, the Court apparently viewed the administrative relationships that necessarily result between government and religiously affiliated institutions in a public aid program as having the potential for the type of "entaglement" or "involvement" with which *Walz* was concerned.[29]

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[29] The *Walz* language referring to direct money subsidiaries appears in that portion of the Court's opinion which discusses the alternatives of taxing or exempting from taxation churches *qua* churches. Thus, it would appear that the direct money subsidiaries discussed by the Court referred to such subsidies to churches *qua* churches. It is not clear that the dangers of "sustained and detailed administrative relationships" would be of the same kind or quality when public money flows to religiously affiliated organizations which are not engaged in strictly religious activities.

The *Walz* decision indicates that government entanglement or involvement with religion carries the danger of government interference that could lead to inhibition of religion. The Court pointedly noted that the First Amendment "will not tolerate governmentally established religion or government interference with religion." 397 U.S. at 669. The only and obvious alternative to exempting churches from taxation was to tax them, an alternative that certainly would not have the effect of establishing religion. The alternative to taxing churches was rife, however, with the potential for government inhibition of religion through "tax valuation of church property, tax liens, tax foreclosures." 397 U.S. at 674. Indeed, the Court viewed the challenged tax exemption as a determination by New York "that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be *inhibited* in their activities by property taxation." 397 U.S. at 672. (Emphasis added.) Even more pertinent to the Court's concern for the freedom of religiously affiliated schools is the following observation made by the Court after it approved the holdings in *Allen* and *Everson:*

> "With all of the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, *we have been able to chart a course that preserved the autonomy and freedom of religious bodies* while avoiding any semblance of established religion." 397 U.S. at 672. (Emphasis added.)

Thus, the question whether a government educational program has the prohibited effect of inhibiting religion

is to be answered by applying the *Walz* test of government entanglement or involvement with religious institutions.

Walz does not bar all involvement, administrative or otherwise, between government and religious institutions. "The test is inescapably one of degree." 397 U.S. at 674. The Court recognized that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* Exemption was the preferred course of governmental conduct because it produced a "lesser" involvement. 397 U.S. at 674-75. Similarly, while recognizing that the necessary administrative relationships in government aid to the secular functions of religiously affiliated schools involved "risks," the Court did not view those relationships alone as constitutionally disabling. 397 U.S. at 672. The Establishment Clause bars only "excessive" involvements between government and religion "calling for official and continuing surveillance *leading to an impermissible degree of entanglement.*" 397 U.S. at 675. (Emphasis added.)

The problem, therefore, is to determine which involvements between government and religion are "excessive" or "impermissible." The *Allen* decision resolves that problem when the Establishment Clause issue arises in the context of public assistance to church-related education. Consistent with this Court's prior decisions, *Allen* permits public aid to the secular educational functions of religiously affiliated schools but requires that such aid be strictly limited to those secular functions. Consequently, the necessary administrative relationships flowing from such aid programs that do no more than assure that public funds

will be spent for only secular educational functions cannot be "excessive" or "impermissible." Indeed, such limited administrative relationships are probably constitutionally required to assure a proper and constitutional use of public funds.

Problems of impermissible and excessive government involvement with religion would arise if the administrative controls placed on religiously affiliated schools were broader than necessary to assure a purely secular use of public funds. The most serious of such problems would be any effort by public officials to regulate or interfere with the religious functions of church-related schools. Government cannot constitutionally support the religious functions of those schools. Neither can it seek to control or supervise those functions. Such governmental action would result in serious inhibition of religion and lead to the very form of government entanglement and involvement with religion that *Walz* declared to be excessive and impermissible. Indeed, a public aid program authorizing such administrative action would smack of an unconstitutional condition upon the availability of government funds. See *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Thus, when government undertakes to aid secular education, benefits derived by religiously affiliated schools from the program will not have a primary effect that either advances or inhibits religion if only the secular educational functions of those schools are aided and if the administrative relationships created by the program are no more extensive than necessary to assure a proper and constitutional use of the public funds.

B. APPLYING THE GOVERNMENT PRINCIPLES

A proper application of the governing constitutional principles outlined above to the facts of this case leads inescapably to the conclusion that the Salary Supplement Act passes constitutional muster. The District Court reached a contrary conclusion because, at two critical points in its analysis, it departed from those governing principles by refusing to determine the primary effect of the Salary Supplement Act, and by seriously misconstruing the *Walz* doctrine of "excessive entanglement."

1. Purpose of the Salary Supplement Act

The District Court properly concluded that the Salary Supplement Act "was not intended to advance or interfere with religion." J.A. 39. No other conclusion is fairly possible in light of the express statement of legislative purpose in the statute. R.I. Gen. Laws § 16-51-1. And *Allen* makes that statutory statement controlling on the issue of purpose. Faced with a deepening crisis of educational quality in the State's nonpublic schools, the General Assembly acted to acquit its constitutional duty "to secure to the people the advantages of education"[30] and to implement "the policy of the state of Rhode Island to provide a quality education *for all Rhode Island youth.*"[31] Aware that "teachers are the prime factor in educational quality," the General Assembly responded to that crisis by providing State funds to permit nonpublic schools "to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." In addition, the General As-

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[30] R.I. Const. art. XII, § 1.

[31] R.I. Gen. Laws § 16-51-1. (Emphasis added.)

sembly provided the salary supplement aid to nonp
lic schools under a statutory scheme carefully tailo
to assure it would aid only secular teaching in
ligiously affiliated schools that might benefit from
Against that background, the District Court declar

> "Certainly, the quality of education in nonpul
> schools is a legitimate legislative concern. *Bo*
> *of Education* v. *Allen,* 392 U.S. at 245-47. We f
> nothing in the history and structure of the
> which suggests that the legislative purpose
> other than as declared." J.A. 39.

Despite the unmistakably secular purpose of
Salary Supplement Act, the appellees have insis
that an impermissible religious purpose be read i
the statute because, they allege, the General Assem
acted out of improper motives. They discern th
improper motives from the fact that certain religi
leaders favored the legislation [32] and that modificati
made by the General Assembly in the Act as int
duced [33] left teachers in religiously affiliated nonp
lic schools as the principal beneficiaries of the leg
lation. The District Court correctly rejected appelle
invitation to search for the "real" motive of the G
eral Assembly, J.A. 39, and declined "to consider e
dence concerning the activities of proponents of

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[32] For example, the appellees' counsel at trial questioned
Edward W. K. Mullen, Superintendent of Schools for the Ro
Catholic Diocese of Providence, at length about his support for
Act while it was pending before the General Assembly. J.A. 59
The Court below necessarily viewed all of that evidence as irr
vant when it stated: "[W]e necessarily reject plaintiffs' atte
to divine the 'true intent' of the legislature by inspecting the
tivities of lobbyists." J.A. 39.

[33] The Salary Supplement Act, as introduced in the Gen
Assembly, was placed in evidence by the appellees. Plainti
Exhibit No. 6, J.A. 178.

Salary Supplement Act." J.A. 30, n. 2.[34] For this Court has long adhered to the rule that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien,* 391 U.S. 367, 383 (1968); see *Daniel* v. *Family Security Life Ins. Co.,* 366 U.S. 220, 224 (1949); *Arizona* v. *California,* 283 U.S. 423, 455 (1931); *McCray* v. *United States,* 195 U.S. 27, 56 (1904).

That salutary principle is particularly appropriate in this case. For example, the appellees were highly selective in identifying those who favored the contested legislation. Because the General Assembly does not publish its proceedings, it is impossible to determine how broad-based support for the statute was. The appellees also emphasized an amendment to the original bill that limited the salary supplement payments to teachers in nonpublic schools with per pupil expenditures for secular education that do not equal or exceed the per pupil expenditures in public schools.[35] That amendment has had the effect of excluding most nonreligiously affiliated, nonpublic schools in Rhode Island from the scope of the statute.[36] But, as the court

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[34] It is, of course, clear that support for legislation by religious leaders does not impart a religious purpose to that legislation. "The fact that religious leaders sponsored a law—or even were its sole sponsors—does not make its purpose nonsecular; the Civil Rights Act of 1964 might not have passed without the support of churchmen." J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 277 (1968).

[35] *Compare* Plaintiffs' Exhibit No. 6, § 16-49-2, J.A. 179, *with* R.I. Gen. Laws § 16-51-2, J.A. 183-84.

[36] Even without that amendment, teachers in religiously affiliated schools would be the principal beneficiaries of the Act since Catholic parochial schools enroll 95 per cent of all children attending nonpublic elementary schools in Rhode Island. J.A. 32.

below pointed out, that amendment "serves the legitimate secular purpose of saving state funds by eliminating schools which can well afford qualified teachers." J.A. 40.

The appellees' motive argument is an undeserved insult to the integrity of the legislative process. In enacting the Salary Supplement Act, the General Assembly was carrying out a duty imposed on it by the Rhode Island Constitution and an established state policy to promote the education of all children, irrespective of where they attend school. The legislative concern for nonpublic schools is particularly compelling in Rhode Island where those schools educate 25 per cent of all children at the elementary level. This Court observed in *Allen:*

> "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

The statement of purpose in the Salary Supplement Act demonstrates that the General Assembly was seeking only to implement those values. That 95 per cent of children enrolled in nonpublic elementary schools in the State attend religiously affiliated schools can hardly require the General Assembly to show less concern for the quality of secular education they receive.

2. Primary Effect—No Advancement of Religion

The Salary Supplement Act was designed to improve the quality of secular education in Rhode Island's nonpublic schools. Both the statutory requirements for eligibility for salary supplement payments and the evi-

dence presented at trial show that the enactment's purpose has been achieved without aiding the religious functions of church-related schools that benefit from the statute. For that reason, the statute has generated a primary effect that does not advance religion within the meaning of the *Allen* decision.

The General Assembly knew that teachers in religiously affiliated schools would seek benefits under the Act, and it imposed strict eligibility requirements to assure that only teachers engaged in purely secular educational functions in those schools would qualify. Three of the eligibility requirements are especially relevant.[37] First, only teachers who teach subjects which are required to be taught by state law or which are actually taught in public schools are eligible for salary supplement payments. The State cannot require the teaching of subjects with religious content. Neither can it offer subjects with religious content in the public schools.[38] This eligibility requirement, therefore, assures that only teachers of secular subjects in religiously affiliated schools will receive the salary supplement.

Second, teachers receiving the supplement are required to use books and other teaching materials that are in use in the public schools. The State cannot constitutionally prescribe textbooks with religious content

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[37] Those eligibility requirements are found in R.I. Gen. Laws § 16-51-3, J.A. 184-85.

[38] See *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

for use in the public schools. See *Board of Education* v. *Allen*, 392 U.S. 236, 244 (1968).[39] As a result, this provision assures that teachers receiving State aid will be using teaching materials and textbooks devoid of religious content. And the prescribed textbook is the principal source of course content at the elementary level of education.

Finally, teachers receiving salary supplements are expressly prohibited from teaching a course in religion. This provision is implemented by the requirement that a teacher applying for the supplement sign a statement promising that he or she will not engage in religious teaching while receiving the supplement.[40]

These three eligibility requirements have the effect of restricting the salary supplement payments to teachers engaged in the strictly secular educational functions of religiously affiliated schools. The appellees presented no evidence to show that any teacher not complying with those requirements had qualified for benefits under the statute. Moreover, the appellants presented unrefuted evidence to demonstrate that teachers in Roman Catholic elementary schools who had qualified for supplement payments taught only secular subjects and

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[39] Rhode Island law expressly prohibits the Commissioner of Education from recommending any textbook "of a sectarian nature or containing sectarian material" for use in the State's public schools. R.I. Gen. Laws § 16-1-9.

[40] An application form completed by appellant Earley, which contains the standard disclaimer signed by nonpublic school teachers seeking salary supplements, was allowed in evidence as Plaintiffs' Exhibit No. 11. J.A. 187-88.

did not introduce religion into those courses.[41] In addition, the Diocesan Superintendent of the Catholic schools testified that any introduction of religion into the secular subjects taught in those schools would be contrary to his policies. J.A. 87. Based on that uncontradicted evidence, the District Court made an express finding that religion did not affect the content of secular courses in Catholic parochial schools. J.A. 35. It is clear, therefore, that, to the extent that teachers in those Catholic schools benefit from the challenged statute, only the secular educational functions of those schools are aided by State funds.

The appellants also presented uncontroverted evidence to show that the Salary Supplement Act has had a dramatic impact on the quality of teachers employed by Catholic parochial schools. In the school year immediately preceding the enactment of that statute, the parochial schools were able to offer a starting salary of only $5,000, and they had great difficulty recruiting teachers with adequate educational backgrounds. J.A. 88. After the statute became operative, the parochial schools were able to offer a starting salary of $6,000, J.A. 88-89, and they experienced "a considerable increase in the quality of teachers" seeking employment. J.A. 88. The District Court's opinion reflects that evidence in finding that "the statute will have the significant if temporary effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools." J.A. 37.

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[41] J.A. 103, 108, 111, 114, 116. In their post-trial brief, the appellees argued that there is necessarily religious permeation of secular courses in the parochial schools. That argument was based not on the testimony of any teacher but on the contents of one document the appellees placed in evidence. Plaintiffs' Exhibit No. 14. The fallacies of the appellees' permeation argument are examined at pages 71-75, *infra*.

Consequently, the Salary Supplement Act has generated the precise effect contemplated by the General Assembly—the improvement of the quality of secular education in the State's nonpublic schools. Under the *Allen* decision, that effect must be viewed as "primary" for Establishment Clause purposes. In addition, that effect has been achieved by supporting only the secular educational functions of religiously affiliated schools. Any benefit to religion from the statute is purely collateral and incidental. For that reason, the primary effect of the statute does not advance religion. As a result, the Salary Supplement Act meets all of the requirements of the *Allen* decision for Establishment Clause validity.

Despite the clarity of the record on this issue, the District Court balked at ruling that the statute's primary effect is not to advance religion.[42] It refusal to do so is simply at war with this Court's decision in *Allen*.

The majority in the District Court created for itself an illusory dilemma when it identified two "significant" effects of the Salary Supplement Act. The first was the improvement in the quality of secular education in Catholic parochial schools. The second was that "the Act gives significant aid to a religious enterprise." J.A. 37. Faced with two effects it had labeled as "significant," the majority declined to engage in further analysis, commenting that any effort to isolate a "primary" effect would be "no more satisfactory than efforts to rank the legs of a table in order of importance." J.A. 40. The *Allen* test of primary effect

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[42] It was on this precise point that Judge Pettine dissented from the majority decision. J.A. 48-50.

necessarily presupposes that more than one effect has resulted from a challenged statute. Unless *Allen* is to be overruled, it is the task of courts to analyze the statute's several effects in light of that decision's principles and to identify the effect that is primary.

The essential error of the majority below was to equate by the use of the label "significant" two effects which, under this Court's decisions, do not have equal constitutional significance. The central concern of the Establishment Clause is whether public educational assistance is limited to the secular functions performed by religiously affiliated schools that benefit from it. If the aid is so limited, it is constitutionally immaterial that such schools derive tangible benefits from the aid program. It is this critical distinction that the majority below obscured by attaching the label "significant" to the two effects it identified in its opinion.

Moreover, the evidentiary base for the majority's ruling that a "religious enterprise" is aided by the challenged statute is open to serious question. In concluding that parochial schools are "religious enterprises," the majority resorted principally to appellees' evidence which sought to establish that a "religious atmosphere" existed in Catholic parochial schools. That evidence showed, *inter alia,* that parochial schools place religious symbolism on and within their buildings, recite prayers in classrooms, teach a course in religion,[43] and engage in certain other religiously oriented activities. From that evidence, the majority drew an

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[43] It should be noted, however, that the school day is one-half hour longer in the parochial schools than in the public schools. The extra half hour is to permit the parochial schools to teach religion while still offering the complete secular curriculum required by Rhode Island's compulsory attendance law. J.A. 126.

obvious conclusion—namely, that "the diocesan schools possess a number of distinctively religious attributes which distinguish them from public schools." J.A. 35. But that fact was not in dispute in this litigation. Indeed, the appellants conceded that parochial schools are different from public schools.[44] But that fact cannot be decisive of the Establishment Clause issue in this case. For, although the "meager record" in the *Allen* case did not permit findings on the religious "atmosphere" or activities of the parochial schools that benefited from the New York textbook loan law, it can be assumed that those schools did not differ markedly in their religious attributes from the Rhode Island parochial schools.

The majority below also surmised[45] from the appellees' evidence on "religious atmosphere" that the Roman Catholic Church "gains special advantage from a curriculum which contains both religious and secular subjects" and that "the diocesan school system is an integral part of the religious mission of the Catholic Church." J.A. 36. But those factors are also without controlling constitutional significance. For, in the *Walz* decision, this Court endorsed the decision in *Everson* v. *Board of Education, supra,* while acknowledging that

> "bus transportation and police protection to pupils who receive religious instruction 'aid' that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not

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[44] See Trial Transcript 22 (March 19, 1970).

[45] See note 11 *supra,* and accompanying text.

dominant policy of church schools." 397 U.S. at 671.

Thus, this Court has expressly recognized that the critical issue is not whether schools assisted by public expenditures are religious in nature or whether those schools are maintained and perpetuated by their adherents for subjective religious reasons. The critical issue is whether those schools, in addition to their religious functions, are providing a secular education for their students that government can aid without infringing upon core Establishment Clause values. And *Everson* and *Allen* make clear that those constitutional values will be fully protected if the public assistance is strictly limited to the secular educational functions of those schools.

The lesson of *Everson* and *Allen* is that government does not aid a "religious enterprise" when it extends secular educational assistance to religiously affiliated schools. Rather, government aids only an *educational enterprise* which happens to have certain religious attributes, as long as those religious attributes are not the object of the public assistance. Judge Pettine, in his separate opinion, most clearly recognized that important distinction when he declared that the statute in question cannot be viewed as aiding a religious enterprise absent proof "that the secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment." J.A. 49. Judge Pettine found the record in this case "barren" of any such proof, *id.*, a finding that the majority necessarily endorsed in stating that the concern for religious values did not "affect the content of secular subjects in diocesan schools." J.A. 35.

The majority below did not depart from the path of constitutional analysis marked out by *Allen* without

some apparent uneasiness.[46] For it attempted to justify its "religious enterprise" thesis by arguing that the focus on secular functions mandated by *Allen* could lead to abuse through "sophisticated bookkeeping." J.A. 41. That term has pejorative ring to it, suggesting that parochial schools might seek aid for their religious functions by juggling their books. The majority tried to disclaim such an inference by stating that "we do not intend our reference to 'sophisticated bookkeeping' to imply only sham allocations of expenditures." J.A. 41, n. 9.[47] Rather, the majority ex-

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[46] In fact, the majority sought to buttress its refusal to follow the *Allen* decision by placing two glosses on the salary supplement program that simply have no basis in fact. First, the majority characterized the *Allen* focus on the secular educational functions of religiously affiliated schools as "narrow" and "unrealistic when examining direct financial aid to denominational schools." J.A. 41. The majority could make that comment in the context of this case only by disregarding the fact that the salary supplement payments are made directly to individual teachers by the State. R.I. Gen. Laws § 16-51-5. There is simply no "direct financial aid to denominational schools" under the Salary Supplement Act.

Second, the majority seems to imply that state funds are assisting the "maintenance of an educational environment within which religious instruction takes place in varied ways." J.A. 41, n. 9. But the Salary Supplement Act provides no assistance to an educational "environment." State funds are paid to qualified teachers of secular subjects so that children attending nonpublic schools will receive a higher quality secular education.

[47] Judge Pettine did not share the majority's apprehension of "sophisticated bookkeeping." He said of that portion of the majority's opinion:

> "Such reasoning equates the legal and bookkeeping definitions of 'secular' and 'religious.' The law is equipped to distinguish bookkeeping entries from legally distinct entities. The secular-religious distinction is fundamental; it will take more than accounting machinations to elude it." J.A. 49.

Judge Pettine's analysis is for more consistent with the proper role of the judiciary in constitutional adjudication. See *Walz* v. *Tax Commission*, 397 U.S. 664, 679 (1970).

plained that it was concerned that even an honest allocation of parochial school expenditures would show that those schools spend only a small portion of their funds on their religious functions. For that reason, the majority feared that application of the secular function rule of *Allen* would require the validation of a public assistance program that made far greater amounts of government funds available to aid religiously affiliated education. J.A. 41, 43. But if the Constitution permits the government to aid secular educational activities, it is not a proper function of the judiciary to worry whether a greater or lesser amount of public funds should be allocated to those activities in schools with religious affiliations. In expressing those concerns in this case, the majority below was speculating on whether additional aid to the secular functions of church-related schools would be wise legislative policy. Such considerations are beyond the scope of federal judicial power. For the judiciary is limited to deciding whether an exercise of legislative power is constitutional—not whether it is wise.

For these several reasons, the court below clearly departed from the governing Establishment Clause principles when it declined to rule that the Salary Supplement Act had generated a primary effect that did not advance religion. The requirements for eligibility under that statute and the record in this case demonstrate beyond dispute that such a primary effect has resulted from the statute's operation. For that reason, the Salary Supplement Act meets the test laid down in *Allen* for constitutional validity.

3. Primary Effect—No Inhibition of Religion

The District Court was unanimous in its conclusion that the Salary Supplement Act would produce unconstitutional involvement between government and religion and that the statute contravened the Establishment Clause for that reason. The District Court's ruling on that issue represents, at best, a misunderstanding and a misapplication of this Court's recent decision in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970).[48]

As noted earlier in this brief,[49] *Walz* is the focal point for the second phase of the primary effect inquiry—namely, whether a contested statute inhibits religion through excessive and impermissible involvement of government with religion or religious institutions. The precise concern expressed in *Walz* was with the administrative relationships that inevitably arise between public officials and religiously affiliated schools when those schools participate in spending programs for educational improvement. 397 U.S. at 672. The court below made the administrative relationships created by the Salary Supplement Act a principal element in its *Walz* analysis. J.A. 43-44. However, that court failed to analyze those relationships critically and apparently overlooked this Court's admonition that the test of entanglement or involvement is "inescapably one of degree." 397 U.S. at 674.

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[48] The court below was the first court to apply the principles of the *Walz* decision to a public spending program for education. The *Walz* case was decided by this Court exactly four weeks after the parties to this appeal filed their post-trial briefs with the District Court. That court decided this case exactly six weeks later without giving the parties an opportunity to brief or argue the relevance of the *Walz* decision.

[49] See pages 35-39, *supra.*

The principal administrative relationships created by the Salary Supplement Act are those between teachers in nonpublic elementary schools and State officials.[50] The crucial eligibility requirements imposed by the Act are concerned with the qualifications and activities of teachers, not schools.[51] Further, the expenditure of funds under the Act results in dealings only between the State and individual teachers. Each teacher seeking a salary supplement must file an individual application with the Commissioner of Education,[52] and the supplement payments must be made directly to the eligible teachers and "not through the agency of the nonpublic school in which the teacher is employed."[53] Thus, the administrative machinery of the contested

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[50] It is this feature of the Salary Supplement Act that distinguishes it from Connecticut's Nonpublic School Secular Education Act, which a three-judge federal court recently invalidated on the authority of the *Walz* decision. *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D.Conn., decided October 14, 1970). Under the Connecticut statute, the appropriated funds flow directly to nonpublic schools and the essential administrative relationships are between state officials and those schools. To state this distinction between the Rhode Island and Connecticut programs is to underscore the importance of recognizing that the *Walz* test of entanglement is precisely what this Court stated it to be—a question of degree. For that reason, each statutory scheme must be evaluated on its own merits and the reasoning of one court ruling on a particular statute is not readily transferable to a wholly disparate statutory scheme. Whatever the merits of the *Johnson* court's analysis, that analysis is not relevant to the Salary Supplement Act under which State officials deal primarily with individual teachers and not with nonpublic schools. And, presumably, the time for judging the merits of the *Johnson* decision will be when that case is appealed to this Court.

[51] R.I. Gen. Laws § 16-51-3.

[52] *Id.*

[53] R.I. Gen. Laws § 16-51-5.

statute generates mainly contacts between State officials and teachers in nonpublic schools, and those contacts raise no colorable Establishment Clause issue. For the concern expressed by this Court in *Walz* was with excessive and impermissible involvement between government and religion or religious institutions.

Three provisions of the Salary Supplement Act authorize administrative relationships between State officials and religiously affiliated schools, and only one of those provisions troubled the District Court.[54] The statutory definition of "nonpublic school" limits salary supplement payments to teachers employed by nonpublic schools with per pupil expenditures for secular education that do not equal or exceed the average per pupil expenditure in the public schools.[55] Thus, those administering the Act must decide whether a particular school satisfies that definition before they can determine whether teachers in that school qualify for payments.[56]

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[54] The District Court apparently perceived no Establishment Clause issue in the other administrative contacts authorized by the Act. The first is the requirement that schools employing teachers receiving salary supplements comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which proscribes discrimination in employment. The second is the statutory authorization for an audit of nonpublic school books to assure that teachers receiving salary supplements are being paid the minimum salary required by the Act as a condition for eligibility. R.I. Gen. Laws § 16-51-5. Quite obviously, neither of those provisions creates the type of administrative relationships that bothered this Court in *Walz*.

[55] R.I. Gen. Laws § 16-51-2.

[56] To assist the Department of Education in making that determination, nonpublic schools submit annually a statement of their operating expenditures on a form supplied by the Department. See J.A. 189.

The District Court's concern with that statutory provision was expressed in these words:

> "[T]he Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which is 'secular.' This ongoing administrative relationship creates the possibility of legal disputes over the 'secular-religious' distinction." J.A. 43-44.[57]

The fears expressed by the court below are simply not justified by the record in this case. More importantly, the administrative relationships created by the Salary Supplement Act are, at worst, minimal and insignificant when considered in light of the long and deep involvement of the State in nonpublic education that exists apart from that statute.

The record in this case demonstrates—and the court below conceded—that, for the foreseeable future, State officials will find it unnecessary to make any close judg-

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[57] The most glaring anomaly in the District Court's reasoning is its suggestion that an Establishment Clause violation arises when public officials are required to draw distinctions between what is secular and what is religious in administering an educational assistance program. For the secular-religious distinction is fundamental to Establishment Clause doctrine. It is a distinction that legislatures must draw in defining the scope of any educational program, whether it affects public schools or religiously affiliated nonpublic schools. See, *e.g.*, R.I. Gen. Laws § 16-1-9. It is a distinction that courts must make when the validity of such programs is challenged on Establishment Clause grounds. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963). And it necessarily is a distinction that must be drawn in the administration of such programs if Establishment Clause limitations on governmental power are to have any force or effect. To suggest that drawing such a distinction is constitutionally suspect is to suggest that government is prohibited from undertaking any program in which such a distinction might arise.

ments concerning the secular-religious distinction in the expenditures of the vast majority of nonpublic schools in Rhode Island. Roman Catholic elementary schools educate between 90 and 95 per cent of all children attending nonpublic elementary schools in Rhode Island. J.A. 58. Religious orders supply a significant number of teachers to those parochial schools, and the members of religious orders are paid salaries substantially lower than the salaries paid to lay teachers.[58] For that reason, the total operating costs of parochial schools are markedly lower than the operating costs of public schools. The court below recognized that fact when it stated that "[a]s long as Catholic schools rely heavily on nuns, their wage costs are likely to remain substantially below those of the public schools, . . . thus obviating the need to break down expenditures." J.A. 32, n. 6.

In the first year of the Salary Supplement Act's operation, only two non-Catholic schools reported their expenditures to the Department of Education, and both showed total per pupil expenditures in excess of those in the public schools. One of those schools clearly did not meet the statutory definition of "nonpublic school" in terms of its per pupil expenditures, J.A. 100, 146-48, and there is no evidence to show that determination led to the conflicts and legal disputes feared by the District Court. The other school apparently presented the "close case" envisioned by the court below, but because no teacher in that school had applied for the salary supplement, there was no need for further inquiry or investigation. See J.A. 98-100, 146-48.

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[58] The parochial schools pay teachers who are members of religious orders annual salaries of $1,800 or $1,900, compared to starting salaries of $6,000 for lay teachers. See J.A. 88-89.

Thus, the potential for conflicts and disputes feared by the court below is more imagined than real. And, even when a "close case" arises, there is no evidence that conflict would necessarily flow from the administrative relationships that would result between State officials and religiously affiliated schools. The State official responsible for administering the Salary Supplement Act testified that, in a close case, he would visit the nonpublic school and seek to obtain a precise figure for the per pupil cost of secular education at that school.[59] But there is no evidence that he would approach that task in a hostile or adversary posture. He is a professional educator with long experience, J.A. 130, and, as such, has a sound working knowledge of how schools allocate their expenditures among the various component parts of their instructional program. The concept of per pupil costs is a familiar one to educators, J.A. 148, and its various elements are subject to objective evaluation by educators. The exercise of that professional judgment cannot be presumed to be a necessary source of conflict and dispute without affirmative proof of such conflict. The record of this case is devoid of such proof for the first full year of the Salary Supplement Act's operation.

Thus, in actual operation and future potential, the administrative relationships required by the per pupil cost provision of the Salary Supplement Act are minimal and non-abrasive. Yet the District Court viewed those minimal relationships, standing alone, as consti-

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[59] J.A. 100. The need for that further investigation would arise because the forms completed by nonpublic schools do not request a breakdown of secular and religious expenditures. See J.A. 136-39. However, for the overwhelming majority of nonpublic schools in the State, those forms will reveal a school's eligibility without such a breakdown. J.A. 138.

tutionally disabling under the *Walz* test of "entanglement." It could have reached that conclusion only by ignoring the critical fact that the *Walz* test, in its application, is a question of degree.

The District Court also considered the administrative relationships engendered by the Salary Supplement Act in isolation and apart from the State's many involvements in nonpublic education that long predated the challenged statute. Those other involvements cover a broad range of nonpublic school operations, including the courses to be taught, the length of the school day and school year, participation in federal and state aid programs, and provisions for the health and safety of students. The various statutes giving rise to these other involvements and administrative relationships between the State and nonpublic schools are listed and summarized in the Appendix to this brief, and they demonstrate that the administrative relationships created by the Salary Supplement Act are indeed insignificant.

The principal source of the State's involvement with nonpublic schools, including those with religious affiliations, is the State's Compulsory Attendance Law. R.I. Gen Laws § 16-19-2.[60] That statute gives local school committees a life-or-death power over all nonpublic schools. Those school committees are required to evaluate and approve nonpublic schools, and only those nonpublic schools that receive such approval can permit their students to comply with the compulsory attendance requirements. A school not receiving such approval simply cannot exist as a full-time educational enterprise for children under the age of 16. To obtain that approval, nonpublic schools must comply with a

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[60] See also R.I. Gen. Laws § 16-22-2.

series of statutory requirements, including a period of attendance "substantially equal to that required by law in public schools" and a curriculum that includes "reading, writing, geography, arithmetic, the history of the United States, the history of Rhode Island, and the principles of American government . . . taught in the English language." *Id.* The enforcement of those requirements presents a far greater potential for conflict with religiously affiliated schools than does the Salary Supplement Act, particularly since the requirements relating to curriculum content limit severely the amount of time those schools might otherwise want to devote to religious instruction.

Despite the potential for conflict inherent in compulsory attendance laws, this Court has never suggested that those laws might violate the Establishment Clause because of excessive entanglement or impermissible involvement between government and religiously affiliated schools. In fact, this Court has expressly ruled that such compulsory attendance laws are within a state's constitutional power. In *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925), the Court conceded the states' power "reasonably to regulate *all* schools, to inspect, supervise, and examine them." (Emphasis added.) The Court reiterated that principle in *Allen* when it declared that states can

> "insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." 392 U.S. at 245-46.

Those same principles have also found expression in *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947),

and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 631 (1943).

Viewed against the background of the State's broad power to regulate and supervise religiously affiliated schools under the compulsory attendance law, the administrative relationships between those schools and the State under the Salary Supplement Act are minimal and insignificant. In no sense are those relationships "excessive" or "impermissible" within the meaning of *Walz* and in no sense will they lead to the inhibition of religion, which the *Walz* test is designed to prevent.

The statutory and administrative scheme of the Salary Supplement Act is carefully tailored to assure that State funds will be spent properly and constitutionally. The eligibility requirements imposed on individual teachers are designed to limit the public aid to the secular educational functions of religiously affiliated schools, as *Allen* requires. And the enforcement of the statute's per pupil cost provisions prevents the squandering of public money on schools that can afford to hire qualified teachers with their own funds. J.A. 40. No State involvement with the religious functions of church-related schools is required and none results. Consequently, the Salary Supplement Act does not have the effect, primary or otherwise, of inhibiting religion.

4. Other Walz-Related Issues

The District Court's apparent misunderstanding of the *Walz* decision is reflected in other aspects of its primary effect analysis. For example, the District Court seemed to construe the *Walz* test of entanglement as having displaced and superseded the *Schempp-Allen* concern with whether an enactment advanced or

inhibited religion. That is the only explanation for the following sentence from the District Court's opinion:

> "*Walz* thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards." J.A. 42.[61]

To read *Walz* as displacing the *Schempp-Allen* test of primary effect is to disregard the factual context in which the *Walz* test of entanglement was applied.

At issue in *Walz* was the constitutional permissibility of exempting church property from taxation. Had the Court held such exemptions to be constitutionally prohibited, government would have had only one alternative—to tax church property. The Court conceded in *Allen* that the *Schempp* test "is not easy to apply," 392 U.S. at 243, a concession that became an understatement in light of the dilemma posed by *Walz*. For exempting church property from taxation "helped" (*i.e.,* advanced) religion just as surely as taxing that property would have "hurt" (*i.e.,* inhibited) religion. When the only alternatives facing government are to

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[61] The District Court also observed that "neither the majority nor concurring opinions [in *Walz*] rely on the *Schempp* formulation." J.A. 42, n. 10. That observation is inaccurate since the majority in *Walz* examined both the purpose, 397 U.S. at 672, and the effect, 397 U.S. at 674, of exempting church property from taxation. It is true that the Court in *Walz* did not quote the *Schempp* formulation of the purpose and primary effect test. But that formulation appears verbatim in *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968), a decision which the majority in *Walz* cited with obvious approval. 397 U.S. at 371-72.

advance or inhibit religion, it is an idle and unprofitable exercise to analyze the effects of those alternatives in terms of whether they advance or inhibit religion. Under such circumstances, it was wholly appropriate for this Court to look solely to whether one alternative or the other would lead to lesser involvement of the government with religion.

That same dilemma is not present when the government action results in benefits to religiously affiliated institutions that perform both secular and religious functions. Such government action does not necessarily either advance or inhibit religion, and the *Schempp-Allen* formulation of the primary effect analysis is the most appropriate and most viable constitutional test to apply. Indeed, an exclusive concern with entanglement and involvement would be wholly inadequate to reveal constitutional defects in some public spending programs. For example, an unrestricted grant of public funds to a religious institution performing both secular and religious functions would presumably satisfy the *Walz* test of entanglement, since no administrative relationships would be created. But that test would not reveal whether such an unrestricted grant would impermissibly aid the religious functions of that institution. The secular function inquiry of the *Allen* test fills that analytical gap.

To state this critical distinction is simply to acknowledge that the test of purpose and primary effect formulated by the *Schempp* and *Allen* decisions will not necessarily resolve all Establishment Clause issues. The same is true of the *Walz* test of entanglement. But the question of whether an enactment advances or inhibits religion is the most appropriate constitutional standard when government assistance to secular education

in church-related institutions is at issue. The Court recognized that fact less than two years ago when it applied the *Schempp* test to that precise issue in the *Allen* decision. *Walz* supplements the *Schempp-Allen* test of primary effect by making the entanglement factor the focus of the inhibition analysis.

In its *Walz* analysis, the court below also discussed a form of entanglement between government and religion that it feared would arise independently of the administrative relationships created by the Salary Supplement Act. Noting that appropriations under the Act, unlike tax exemptions, must be renewed annually, the District Court was apprehensive that "the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy." J.A. 43. The District Court also speculated that "[i]n Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools." *Id.* The court below clearly indicated that the mere possibility of the "bitter controversy" it perceived was sufficient to invalidate a statute under the *Walz* test of entanglement.

Any constitutional rule that strikes down legislation on the basis of controversy existing in the political forum will inevitably sow the seeds of the very controversy it seeks to avert. For that rule will encourage the initiation and prolongation of controversy by those who fail to convince the legislature that a particular statute is unwise or who fail to persuade a court that it is unconstitutional. Such a rule would give a virtual constitutional veto to anyone who shouted long enough and loudly enough and would place a premium on per-

petuating the very form of strife and controversy that the District Court wanted to avoid.

Equally important is the unjustifiably myopic view that the District Court took of the public debate over aid to nonpublic education. The District Court apparently assumed that, because religious organizations have traditionally played a major role in nonpublic education in this country, the proponents and opponents of such aid must necessarily align according to religious divisions. But more is at stake in the debate than whether one or more religiously affiliated schools will derive some benefits from such aid programs. One of the most fundamental issues in that debate is bereft of religious overtones—namely, whether our children must be educated in a uniform system of public schools which offer the same education to all or whether parents and children can make choices in a mixed system of public and private schools on the basis of the type and quality of education offered.

Because of the prominent role traditionally played by religious organizations in nonpublic education, their voices will inevitably be heard in that debate. But those groups are not constitutionally barred from raising their voices in the political forum. As this Court observed in *Walz*:

> "Adherents of particular faiths and individual churches frequently take strong positions on public issues, including . . . vigorous advocacy of legal and constitutional provisions. Of course, churches as much as secular bodies and private citizens have that right." 397 U.S. at 670.

The court below would turn the exercise of that right into a reason for invalidating legislation, particularly

if opposition to a position taken by a religious organization on legislation is framed in religious terms. No rule of constitutional law could be more subversive of our democratic processes or more disparaging of the ability of our system of government to accommodate differences of opinion, no matter how deeply held, on important public questions.

At root, the District Court's readiness to strike down the Salary Supplement Act because there may be pressure in the future from religious or anti-religious groups to expand or contract the program's scope has no foundation in constitutional law. At best it represents *in terrorem* rhetoric. This Court long ago admonished that "alarms . . . are not arguments," *United States* v. *Ohio Oil Co.*, 234 U.S. 548, 575 (1914), and warned that to "push propositions to the extremes to which they . . . [might theoretically] lead is often an unsafe guide" in constitutional adjudication. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 397 (1904). The record in this case is barren of any proof that the passage of the Salary Supplement Act and its operation for more than one year has sparked the sectarian controversy envisioned by the court below. Indeed, the only significant controversy to date has been generated by the six taxpayers who initiated this litigation, and their complaints have been heard through the orderly judicial process without sapping the vitality of political life in Rhode Island.

An additional concern of the District Court was that "the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools." J.A. 44. In particular, the District Court worried that there would evolve "a sub-

stantial limitation on the freedom of parochial schools to set their own curriculum." *Id.* The District Court, of course, overlooked the far more severe limitations on that "freedom" which are imposed by the presumptively valid Compulsory Attendance Law. Equally significant is the District Court's apparent assumption that the Salary Supplement Act makes parochial schools the coerced and unwilling victims of such supposed limitations on their freedom. But no school is compelled by the State to arrange its affairs so that its teachers will become eligible for salary supplement payments. *Cf. Steward Machine Co.* v. *Davis,* 301 U.S. 548, 585-93 (1937). Participation in the benefits of the Act is wholly voluntary, and there is no proof that any school has unwillingly or unwittingly conformed to its requirements. In fact, there is evidence that some schools have deliberately exercised their choice not to participate. J.A. 149-50.

Even if it is assumed that parochial schools must surrender some of their "freedoms" to qualify their teachers, the concept of waiver is not unknown in constitutional law. An uncoerced decision to alter an otherwise acceptable course of behavior presents no constitutional question, absent a showing that the decision has been induced by imposition of an unconstitutional condition. But there has been no suggestion of such an unconstitutional condition in this case and, if one did exist, those subject to that condition would presumably be the proper parties to complain about it. To raise the specter of a possible loss of a freedom by schools making no such complaint seems more an expression of judicial paternalism than the application of a rule of constitutional law.

C. APPELLEES' CONTENTIONS

The appellees in the court below based their constitutional claims on arguments that were clearly at odds with this Court's Establishment Clause decisions. Several of those arguments warrant discussion in this brief.

1. The "No Aid" Concept

The appellees' principal constitutional argument was based on the decision in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), which they construed as barring all public aid programs that benefit religiously affiliated schools. They derived that rule of law from the following sentence in the *Everson* majority opinion:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

The court below rejected the appellees' literal reading of that isolated sentence, recognizing that this Court has never held that the Establishment Clause prohibits all public assistance to religiously affiliated institutions. Indeed, the District Court noted that, "[a]lthough in both *Everson* and *Allen* tax funds were used to support religious institutions, in both the aid was sustained." J.A. 38; see also *Tilton* v. *Finch,* 312 F.Supp. 1191, 1196-7 (D.Conn.), *prob. juris. noted,* 399 U.S. 904 (1970).

This Court has taken a similar view of the "no aid" connotations of the *Everson* decision. In *Walz,* the Court commented on "[t]he hazards of placing too much weight on a few words or phrases of the Court," and it referred to the very paragraph in *Everson*

containing the "no tax" language relied upon by the appellees. 397 U.S. at 670. The Court expressed some sympathy for Justice Jackson who, in his *Everson* dissent, seemed perplexed that the result in that case was inconsistent with the "no aid" language of the majority. But the Court left no doubt that it was the language of the Establishment Clause, and not language torn from the context of a single opinion, that was controlling. 397 U.S. at 671.

The essential difficulty with the appellees' heavy reliance on the "no tax" language in *Everson* is that the Court neither intended to nor did it in fact postulate that sentence as a legal test to assess the validity of all public spending programs for education which benefit church-related education. The sentence containing the "no tax" language is one of several in *Everson* in which the Court attempted, in very broad and abstract language, to describe the general categories of problems which fall within the purview of the Establishment Clause. See 330 U.S. at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government spending power. The Court has looked elsewhere for the test of those limitations, and the constitutional standard that has evolved from the Court's Establishment Clause decisions is the purpose and primary effect test as articulated principally in *Schempp* and *Allen*.

2. Aid to Church Treasuries

The appellees argued in the court below that the Salary Supplement Act is fatally defective because it provides a direct subsidy to churches. That argument took this form: The financial responsibility for the

operation of parochial schools in Rhode Island rests principally with the parish that operates the school. For the 1969-1970 school year, those parishes made a commitment to pay a starting salary of $6,000 per year. That commitment was made with the expectation that 15 per cent of the total starting salary, or $900, would be paid by the State in the form of a salary supplement. But, if the salary supplement payments were unavailable, the parishes would have to pay the extra $900. See J.A. 92. Thus, the appellees reasoned, the contested statute relieved churches of part of their financial responsibility and, as such, constituted a direct subsidy to those churches.

The court below necessarily rejected the appellees' argument on this issue when it made an express finding that "[t]he Salary Supplement Act will not relieve the parishes . . . of their escalating [financial] burden, but will temporarily enable parochial schools to compete for qualified teachers." J.A. 32. That finding was based on the total evidence presented on the issue of the financial benefits flowing from the Act, rather than on the appellees' selective reading of that evidence.

Although there was testimony that the parochial schools made a "commitment" to pay a $6,000 starting salary before the enactment of the challenged statute, J.A. 91, all of the teacher contracts placed in evidence by the appellees were signed after the General Assembly approved that statute. J.A. 274-83, 110-11. In addition, three of the contracts in evidence were expressly conditioned on the availability of the salary supplement payments. J.A. 278, 279, 283. The evidence also shows that the parochial schools offered a starting salary of $5,000 for the 1968-1969 school year,

J.A. 88, and that only $900 of the additional $1,000 offered for the 1969-1970 school year would be absorbed by salary supplement payments. J.A. 89. Thus, the out-of-pocket expenses of parochial schools, and the parishes which support them, for teacher salaries *increased* during the first year of the Act's operations. And, as the District Court noted, salary increases in public schools would require the parochial schools to increase their out-of-pocket expenditures for the 1970-1971 school year by 10 per cent over the 1968-1969 school year. J.A. 32-33.

Thus, the Salary Supplement Act has simply not resulted in any savings to the parishes which support parochial schools. The appellees' contrary argument is premised not on the consequences of the statute's operation but on the consequences that would flow if the statute were now to cease operating. For the parishes would have been obligated to pay the additional $900 for the 1969-1970 school year only if salary supplement payments had been enjoined by court order. The District Court found that circular reasoning unpersuasive.

However, even if a savings to the parishes could be demonstrated, the appellees still would not have made out an Establishment Clause claim. For this Court in *Walz* approved the holding in *Allen* even though it viewed the New York textbook loan law as providing "aid" to churches sponsoring schools which "relieved those churches of an enormous aggregate cost for those books." 397 U.S. at 671-72. The reason for refusing to strike down a statute because religiously affiliated schools might realize tangible benefits from it was perhaps best stated by the Court 40

years ago in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, 375 (1930).[62]

> "The schools . . . are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. . . . Its [the state's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Cochran reinforces the principle that, when the state seeks to improve the quality of secular education generally, it is the state and school children who are the true beneficiaries of the legislation—not the schools that educate those children.

3. Permeation and the Handbook

Apparently mindful of the burden imposed on them by the *Allen* decision, the appellees sought to construct an argument in their post-trial brief that secular teaching in parochial schools is permeated by religion. If the appellees could establish such permeation practices by teachers receiving salary supplement payments, they would presumably prevail under the Establishment Clause theory advanced by this brief. See pages 34-35, *supra*. However, the evidentiary materials from which the appellees sought to construct their permeation argument are fragile and suspect and, in most respects, are contradicted by more persuasive evidence in the record.

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[62] *Cochran* involved a Fourteenth Amendment challenge to a Louisiana statute which provided textbooks for use in nonpublic schools, including those with religious affiliations. This Court placed substantial reliance on *Cochran* in ruling in *Allen* that parochial schools perform the distinct functions of secular education and religious instruction. See 392 U.S. at 247.

The principal source of the appellees' permeation argument is the Handbook of School Regulations of the Diocese of Providence, which the appellees placed in evidence over strenuous objections. J.A. 56-58, 67-70, 93-96, 120-27. The bases for those objections were that the appellees had not laid a proper foundation for the document's admission in evidence, that many parts of the Handbook had never been in force or effect, and that other parts of the Handbook had been superseded by directive or contrary practice. J.A. 56-57. The District Court, however, allowed the Handbook in evidence after counsel for appellants identified a number of provisions in that document which were no longer in force or effect. J.A. 120-27.

Despite the conditions under which the Handbook was admitted in evidence, the appellees have continued to rely on the deleted portions of that document, and two of those deleted provisions are the appellees' sole support for their permeation argument. In a section headed "Religious Activities," the Handbook states that religious formation is not to be confined to formal courses but is to be achieved, *inter alia,* through "the manner in which the curriculum is taught." J.A. 212. The District Court was told that the quoted words did not represent the policy or practice of the parochial schools. J.A. 124. In addition, the Handbook section entitled "Mission Program," states that teachers should integrate mission materials with their teaching and that "[t]his is especially true in the social sciences." J.A. 220. Again, the District Court was informed that the quoted words did not reflect the practice or the policy of the parochial schools. J.A. 124. Yet, relying exclusively on those two inoperative provisions, the appellees argued: "Can it be constitutional for a

state to subsidize the salaries of teachers in church schools who 'integrate' all their instruction with religious content but refrain from conducting the formal 30-minute daily course in religion?" Post-Trial Memorandum of Plaintiffs, p. 19.[63]

The defects in the appellees' permeation argument are obvious and demonstrable. The sole source of that argument is a document whose credibility and operative effect is, at best, open to serious question. Arrayed against that meager evidence is uncontradicted testimony that teachers in parochial schools do not introduce religious content into their secular courses. The Diocesan Superintendent of those schools, whom the appellees called as their witness, testified that the use of secular courses as vehicles of religious formation or instruction would be contrary to his policies. J.A. 87. The parochial school teachers who appeared as witnesses at the trial testified uniformly that they did not inject religion into their secular courses. J.A. 103, 108, 111, 114, 116. And, as the majority in the District Court observed, that testimony "gains added credibility from the fact that several of the teachers were non-Catholics." J.A. 35. Judge Pettine perhaps

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[63] The appellees also noted that the Salary Supplement Act does not expressly prohibit a teacher receiving state funds from introducing religion into secular subjects. Post-Trial Memorandum of Plaintiffs, p. 19. However, the eligibility requirements imposed on teachers seeking salary supplement payments, R.I. Gen. Laws § 16-51-3, can be fairly read to impose such a limitation, particularly since that limitation is constitutionally compelled. More importantly, however, the appellees were unable to produce any proof of permeation by teachers receiving salary supplement payments, despite the absence of any explicit statutory limitation. And there is evidence that such teachers are sensitive to the obligations imposed on them when they receive funds under the Act. J.A. 244.

best summarized the evidence on the issue of permeation:

> "In the instant case not only is the record barren of any proof that the teaching of secular subject matter is a 'religious enterprise,' but also there is *unanimous unrebutted testimony* from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes." J.A. 49. (Emphasis added.)

The majority opinion, if anything, reinforces that review of the evidence on the issue of permeation. See J.A. 35, 36.

The appellees were, of course, free to challenge the credibility of testimony on the issue of permeation by confronting the various witnesses with the apparently contradictory provisions of the Handbook. But the appellees studiously avoided such a confrontation. Not a single witness was asked to reconcile his testimony with the Handbook provisions the appellees relied on in their post-trial brief. In fact, those teachers who were questioned about the Handbook said that they knew nothing about the Handbook, J.A. 113, 116, or that the Handbook had no bearing on their teaching methods. See J.A. 103.

In *Allen*, this Court refused to rule that "all teaching in a sectarian school is religious" because "[n]o evidence has been offered about particular schools, particular courses, [or] particular teachers." In this case, evidence was presented about particular schools, particular courses and particular teachers. And that evidence shows without contradiction that the secular courses taught in parochial schools by teachers receiving salary supplements are unaffected by religion. The appellees made a feeble effort in their arguments

after trial to overcome that evidence by quoting some inoperative provisions from a document that has doubtful relevance to the operations of parochial schools. If the appellees are permitted to prevail on such highly suspect evidence, then the burden imposed by *Allen* on those seeking to prove permeation is meaningless.

D. CONCLUSION

When a legislative program results in a confluence of government and religious interests, the Establishment Clause requires only that the enactment have a secular purpose and a primary effect that neither advances nor inhibits religion. That constitutional standard recognizes that it would be an idle and futile gesture to seek to relegate government and religious groups to wholly separate spheres of activity in our society, particularly when improving the quality of secular education is at stake. The command of the Establishment Clause is that government maintain a posture of neutrality when its interests and those of religious groups coincide. The purpose and primary effect test, as articulated and applied by this Court, fully implements the command of neutrality and gives a full measure of protection to Establishment Clause values. Judged by that constitutional standard, the Salary Supplement Act satisfies constitutional requirements.

II.

THE APPELLEES' FREE EXERCISE CLAIM

The appellees' complaint also alleged that the Salary Supplement Act violated the Free Exercise Clause of the First Amendment because it amounted to "compulsory taxation for the support of religion or re-

ligious educational institutions." Complaint ¶ 21, J.A. 8, 20-21. The court below found no merit in that claim because the appellees "failed to introduce the kind of particularized evidence necessary" to support such a claim. J.A. 37-38. The District Court's ruling on that issue was compelled by this Court's decisions.

This Court has consistently ruled that a free exercise claim depends upon a showing of direct government pressure operating upon individuals. See, *e.g., Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The governmental pressures which the Free Exercise Clause prohibits are those which coerce an individual to believe or disbelieve in a particular religion or in religion in general. See *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). Thus, in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 223 (1963), the Court declared that "it is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion.* . . . [A] violation of the Free Exercise Clause is predicated on coercion." (Emphasis added.) The Court quoted that language from *Schempp* in *Board of Education* v. *Allen,* 392 U.S. 236, 248-49 (1968), in rejecting the free exercise claim of the appellants in that case—a claim that was identical to that made by the appellees in this case.

The record in this case contains no evidence to show what religious beliefs, if any, are held by the appellees. See *McGowan* v. *Maryland,* 366 U.S. 420, 429 (1961). In addition, the appellees made no showing of how the operation of the challenged statute coerced them in the practice of whatever religion they may adhere to. The appellees alleged only compulsion in the taxing process, a redundancy, and they failed to prove that their re-

ligious beliefs or practices had in any way been coerced or interdicted.

The allegation that a government spending program constitutes compulsory taxation for religious purposes is nothing more than a classic statement of an Establishment Clause claim. See *Flast* v. *Cohen,* 392 U.S. 83, 103 (1968). Thus, because the appellees' Free Exercise Clause claim is only a restatement of their Establishment Clause claim, their free exercise claim must fail for the same reason that their Establishment Clause claim fails. For, as this brief has demonstrated at length, the Salary Supplement Act benefits only the secular educational processes in nonpublic elementary schools and does not support religious instruction or the religious functions of those schools.

CONCLUSION

For the several reasons stated above, the judgment of the District Court should be reversed.

December 24, 1970

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APPENDIX

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Public Regulation of Nonpublic Education in Rhode Island

Title 16, R. I. General Laws

Chapter 8—Federal Aid

§ 4—State Board of Education is empowered to conduct survey of school facilities, including presumably private schools, to evaluate need for federal construction aid.

§§ 7-13—State Department of Education administers federal funds provided for school lunch programs in public and private schools. The Department prescribes rules and regulations governing federally aided school lunch programs to which any school that agrees to participate in program is subject. Regulation includes (§ 11) "audits, inspections and administrative reviews of accounts, records and operations with respect to school lunch programs," as is necessary to assure compliance with Department regulations.

Chapter 12—Rights and Duties of Teachers Generally

§ 4—Every teacher in private school is required to maintain a register of pupils including name, sex, age, names of parents or guardians, time each enters and leaves the school, and daily attendance.

Chapter 19—Compulsory Attendance

§ 1—Children of prescribed ages are required to attend public school or "present a certificate made by or under the direction of the school committee of the city or town wherein he resides, setting forth that the child has attended for the required period of time a private day school or received instruction approved by the school committee . . . ."

§ 2—Private schools, to be approved by school committee for purpose of compulsory attendance laws, must meet

the following requirements: Establish period of attendance substantially equal to that maintained by public school; keep registry of pupils and report same to school committee, Superintendent of Schools, truant officers and State Department of Education; teach "reading, writing, geography, arithmetic, the history of the United States, the history of Rhode Island, and the principles of American government . . . in the English language substantially to the same extent as such subjects are required to be taught in the public schools, and . . . the teaching of the English language and of other subjects herein shall be thorough and efficient."

Chapter 20—Holidays and Days of Special Observance

§ 1—Certain days are declared as holidays and "no session of any school in this State shall be held on any one of said days."

§ 3—Certain other designated days "shall be especially observed with appropriate exercises in all the schools of this State."

[Section 4 of this Chapter refers specifically to public schools, suggesting that sections 1 and 3 are directed to private and public schools.]

Chapter 21—Health and Safety of Pupils

§ 3—State Board of Education promulgates lighting, heating, ventilating, seating and other sanitary standards applicable to "any committee of any body having charge of the erection, alteration, equipment or furnishing of any school building."

§ 4—Governing head of "every public school or private school" is responsible for instructing and training pupils for a prescribed number of fire drills. Failure to comply is a misdemeanor.

§ 5—Department of Education formulates uniform fire code or drill tactics and prescribes forms for reporting re-

sults of fire drills, applicable to public and private schools.

§ 7—Schools subject to compulsory attendance provisions (public and private primary and secondary schools) "shall have a school health program which shall be approved by the State Director of the Department of Health and the State Commissioner of Education."

§ 14—"Every students and teacher in a public or private school, college, or university participating in . . . [certain defined courses of study] shall be required to wear approved eye protection devices at all times while participating in such courses or laboratories."

Chapter 22—Curriculum

§§ 2-10—Prescribes curriculum for public schools which includes courses in history and government pertaining to the United States and Rhode Island, physiology and hygiene instruction, health and physical education, fire prevention, certain foreign languages if requested by a requisite number of pupils, uniform aptitude and intelligence testing and instruction on the use of voting machines. Section 2 states: "No private school or private instruction shall be approved for the purposes of Chapter 19 [compulsory attendance] of this title unless the course of study therein shall make provision for instruction substantially equivalent to that required by this Chapter for public schools."

Chapter 29—Americanization of Schools

§§ 7-8—Persons of ages 16 through 20 not literate in English are required to attend designated public schools or private schools "if the private instruction is approved by the school committee as substantially equivalent in content, method and the hours of instruction offered in public schools."

Chapter 37—State Scholarships

§ 26—State Board of Education is empowered to establish rules and regulations "for such reports, accounting, and statements" from the public or private institution of higher learning where a State scholarship recipient has applied his award. In addition, the institution is required to give the State Commissioner of Education notice when the recipient ceases to be a student in good standing, indicating such change of status and the reason therefor.

Chapter 38—Offenses Pertaining to Schools

§ 2—Pupils in public and private schools are required to be immunized against such diseases as the State Director of Health and Education designates, provided immunization is not contrary to beliefs.

§ 5—Questionnaire to any student that may constitute invasion of constitutional rights or privacy must be approved by Department of Education and local school committee.

§ 10—"Any school receiving aid from the State, either by direct grant or by exemption from taxation, may be visited by the school committee of the town in which such school is situated, and by the Board of Education or its duly authorized agents, whenever they shall deem it advisable."

§ 11—Refusal of school to permit visitation as authorized in section 10 or failure to keep school register or make returns as required by law results in forfeiture of its tax exemption.

Chapter 40—Private Schools

§ 1—All institutions of secondary or higher education before being established or incorporated must have "adequate faculty and educational facilities and equipment and

the proper maintenance thereof" approved by the State Board of Education.

§§ 2, 4—Authority of any educational institution to grant degrees must be specifically included in charter or articles of incorporation; otherwise such degrees are prohibited.

§ 5—Approval of Board of Education provided in section 1 may be revoked for cause.

§§ 8, 9—Penalties described for conferring degree without Board of Education approval of institution.

§ 11—Private schools "shall be registered at the Office of the Department of Education, said registry showing location, name, officers or persons in charge, grade of instruction, and a common language used in teaching. They shall also make a report annually in the month of July to the Board of Education, showing the number of different pupils enrolled, the average attendance, the number of teachers employed, and such other facts of age, attendance and subjects of instruction as said Board may require."

§ 12—With respect to private schools offering instruction to students above the compulsory school age, same requirements as in section 11 and, in addition, the registry to include information on the tuition rates and "the training and experience of the teachers" and the annual report to include "such other facts as the said Board [of Education] may require."

§ 14—Annual reports and registration not required (§§ 11, 12) of private schools "properly registered at the Office of the Department of Education and which have been approved by the Board of Education."

Chapter 48—Educational Services to Very Young Children

§ 2—Private pre-school facilities cannot operate unless "suitable provisions have been made to fulfill such minimum requirements of adequate faculty, health,

safety, sanitation, site, physical plant, educational program, and such other standards as may be established through rules and regulations promulgated by the Commissioner of Education," to whom application is made. Annual approval required.

§§ 3-6—Supporting administrative provisions concerning the grant of authority to the Commissioner to make necessary rules and regulations, enforcement responsibility, revocation of approval and penalties.